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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 LARRY DOUGLAS NIXON,

10 Petitioner,

11 v.

12 TIMOTHY WENGLER, et al.,

13 Respondents.

No. C09-5013 FDB

ORDER ADOPTING REPORT AND  
RECOMMENDATION DENYING WRIT  
OF HABEAS CORPUS AND  
DISMISSING ACTION WITH  
PREJUDICE

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15 This matter comes before the Court on the Report and Recommendation of the Magistrate  
16 Judge that Petitioner's request for habeas corpus relief be denied and the petition be dismissed  
17 with prejudice. The Petitioner has filed objections to the Report and Recommendation  
18 contending that the Magistrate Judge's determination that Petitioner failed to exhaust is  
19 erroneous.  
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21 As detailed by the Magistrate Judge, Petitioner's first claim which alleges a due process  
22 violation based on confusing jury instructions is unexhausted, Petitioner is procedurally barred  
23 from returning to state court, and Petitioner cannot show cause and actual prejudice. Further,  
24 regarding the merits of Petitioner's claim of lack of jury unanimity, the state court decisions are  
25 not contrary to or an unreasonable application of clearly established federal law.  
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1           Petitioner's second claim for relief, that there was insufficient evidence to impose the  
2 firearm enhancement, fails as a review of the record reveals that it cannot be said that no rational  
3 trier of fact could not have found the essential elements of the crime alleged beyond a reasonable  
4 doubt.

5           Finally, Petitioner's Blakely claim that a misapplication of state law improperly enhanced  
6 his sentence fails as the enhancements were based entirely on jury-fact finding.

7           The Court, having reviewed the petition for writ of habeas corpus, the response, the  
8 Report and Recommendation of Magistrate Judge Karen L. Strombom, objections to the Report  
9 and Recommendation, and the remaining record, does hereby find and ORDER:

- 11           (1)    The Court adopts the Report and Recommendation;
- 12           (2)    Petitioner's writ of habeas corpus (Dkts. 3 and 7) are **DENIED** and this action is  
13                **DISMISSED WITH PREJUDICE**; and
- 14           (3)    The Clerk is directed to send copies of this Order to Petitioner, counsel for  
15                Respondent and to the Hon. Karen L. Strombom.

16           DATED this 25<sup>th</sup> day of August, 2009.

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22           FRANKLIN D. BURGESS  
23           UNITED STATES DISTRICT JUDGE